STATE OF MICHIGAN
IN THE SUPREME COURT

****

Appeal from the Court of Appeals
The Honorable William C. Whitbeck, the Honorable Peter D. O'Connell
and the Honorable Patrick M. Meter
****

CITY OF NOVI, a Michigan municipal corporation,

Plaintiff-Appellant,

-vs-

ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST, MARVIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., a Michigan corporation,

Defendant-Appellees.
_____/

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

SECREST WARDLE

REPLY BRIEF OF APPELLANT CITY OF NOVI

ORAL ARGUMENT REQUESTED

Respectfully submitted,

SECREST WARDLE

BY: GERALD A. FISHER (P 13462)
THOMAS R. SCHULTZ (P 42111)
Attorneys for City of Novi
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

March 16, 2005

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INTRODUCTION

The City claimed in the proceedings below that the proposed spur road leading to the Wisne property was a public use because (1) it was to be owned and maintained by the public, and (2) it would improve traffic safety in the area by allowing the removal of the existing Wisne driveway access onto Grand River—the access that the Adells stipulated at the trial court hearing was dangerous—replacing it with an alternate, and much safer, public road access to Wisne from the proposed ring road. The Adells contended that the City only included the spur road in its plans in order to qualify for MEDC grant funding, and that the public safety argument was only a pretext for the City's efforts to confer a special benefit on Wisne. The Adells had apparently concluded that certain improvements that the Road Commission for Oakland County was planning for Grand River were going to eliminate the unsafe driveway in any event, and that a "new" access could then be found somewhere else on the Wisne parcel.

In the lower courts, the Adells had to build their claim from a carefully-assembled set of facts and an argument from inference and speculation. In their Brief on Appeal in this Court, however, they rely heavily on some new evidence that was not available to them below—specifically, an aerial photograph depicting Grand River Avenue after recent improvements by the Road Commission adjacent to the Wisne property. The photo, taken in 2004, shows a driveway to the Wisne site, which the Adells claim proves their contention that an alternate location for the driveway on the Wisne's own property was always available. The problem with that argument, though, is that driveway in the 2004 photo is not new at all; ***it is the same driveway in the same dangerous location***. And it is still there because the Road Commission was not able to remove it and provide alternative access to Wisne from some other public road—like the ring road that the Adells' challenge prevented.

It is hard to say which is more surprising: the Adells' lack of consideration for the appellate process, since the aerial photo is not part of the record on appeal,[1] or their failure to see that the photo actually damages their case. The size of the Wisne site, the intensity of its use, the "hairpin" nature of the curb cut even after the road improvements—it does not take a traffic expert to understand why the Adells stipulated below to the appropriateness of its closure. The 2004 photo confirms that, without the ring road as an alternative public road frontage, the driveway closure cannot happen.

The Adells' Brief tells a story of principled resistance to a project that did not benefit them, done by the City "for" Wisne. Built on an incomplete set of facts, the tale completely ignores some critical points. For example, the Adells knew from the very first discussions of the proposed improvements that the City hoped to build the spur road access to the Wisne property as part of the overall ring road project, and at the outset they were fine with that. For years, in fact, the Adells (directly or through their main tenant, the Expo Center), even discussed with the City the possibility of donating to the City the land for both the ring road and the spur road. Eventually, they changed their mind—which was entirely their prerogative. They cannot now deny, however, that those initial discussions affected subsequent communications about the nature of the spur road improvements.

The notes, memos, and grant applications upon which the Adells have constructed their assertion of impropriety by the City were all generated in that "interim" period when the Adells, the City, and Wisne all expected the same end result, which was the full ring road/spur road system that the City had been depicting on all its plans and drawings since 1984. Put in that fair context, it becomes clear that those documents relate not to the purpose or relative benefits of the road project, but rather to the matter of how to finance it.

[1] The Adells seem to fault the City for not bringing the fact of the completion of the road improvements to the Court's attention. The City was reluctant to introduce new evidence in this Court. MCR 7.311(A).

The question before the Court is what constitutes a public use in the context of public infrastructure improvements like roads, or sewers, or water lines. The City asserts, consistent with this Court's recent ruling in Wayne Co. v. Hathcock, 471 Mich. 445; 684 N.W.2d. 765 (2004), that Michigan law does not sustain the lower courts' findings that the publicly-owned and publicly-maintained roadway at issue, open for public travel without any private party's permission, was actually a private use. For this public road improvement—which involves an actual use by the public of the property to be taken—the question on review should have been one of ***public necessity***, not ***public use***. Despite the Adells' claims to the contrary, the lower courts clearly addressed this case ***only*** in the legal context of public use, under the now-overruled standard described in Poletown Neighborhood Council v. Detroit, 410 Mich. 616; 304 N.W.2d. 455 (1981).

The public use analysis that the Adells propose—a "case by case" factual review conducted by a court weighing the relative public and private benefits of every public infrastructure project, followed by a ruling as a matter of law as to its public or private nature (separate, presumably, from any factual inquiry into public necessity)—is practically, historically, and constitutionally indefensible. Their resuscitation of this Poletown-like "heightened scrutiny" balancing test for application to public improvement projects would impose a new and unprecedented burden on the judicial system, involving it in the most basic decisions as to when and where such improvements should be made, and a massive economic burden on the taxpayers and job-providing businesses who fund public infrastructure improvements, maintenance, and repairs here in Michigan.

1. The Adells' "Pretext" Claim is Based on a Selective Presentation of Facts

The City chose not to counter even the more salacious factual assertions made by the Adells at the trial court hearing or in the Court of Appeals. The City took the position that, by framing their challenge to the spur road in the language of "public use," the Adells had limited the relevant inquiry in the trial court, and that the real issue before the court was the undeniably public nature of all the

proposed improvements, including the spur road. Because of the way they presented their case below, the Adells now find themselves in possession of what they believe are "unrefuted" facts that make the City's actions look unfair. A review of just a few of the pieces in the Adells' complex evidentiary puzzle, however, shows just the opposite.

The Winarski "notes" (1992). These documents, allegedly prepared by or for Mr. Victor Winarski, a Wisne employee, to memorialize meetings with the City, are offered as proof that the City "assured" Wisne that the proposed industrial spur would be nothing more than a "private" drive for Wisne's benefit only. (Adells' Brief, pp 2, 12.)[2] However, the specific language quoted by the Adells, to the effect that the spur road "is really a private roadway," is taken entirely out of context. A fair reading of the whole document reveals that a concern had been expressed by Wisne that the City might want it "to give a right of way over our internal roadway system." (Appellee's Appendix, p 4b.) The City "assured" Wisne only that it did not intend to extend the public road system into the Wisne industrial complex—not that the spur road would be private.

What the Winarski notes do clearly show, though, is that as of 1992 the City, Wisne, and the Expo Center—the Adells' own major tenant, who held a long-term lease—fully expected that the Adells would donate the necessary land to make all of the proposed road improvements, including both the ring road and industrial spur. The 9/2/92 notes are particularly clear: "Blair [Bowman, Expo Center] has indicated the Adell Childrens Trust was willing to donate property to the project with a value of $260,000...." (Appellee's Appendix, pp 5b.) At that dollar amount, the description necessarily includes ***both*** the ring road and the industrial spur.

The 1992/1993 MEDC Application. In a signed letter to the City dated August 13, 1992, bearing a regarding line entitled "Cooperation on Extension of Northwest Quadrant Ring Road-

[2]The documents were never admitted into evidence at trial; the Adells' attorney tried to use them to "refresh" Mr. Winarski's recollection, but in the end he neither confirmed that he had prepared them, nor acknowledged their contents. (TR Vol I, pp 122-127; 129-131.)

Category A Funding Grant," the Adells state unequivocally that "after reviewing [the preliminary plans for the project] and subject to final details, ***we would be willing to dedicate and donate the necessary right-of-way for those portions of the road system which fall on the trust property.***" (Appellant's Supplemental Appendix, p 319a, emphasis supplied.) That letter was secured immediately before the City filed its 1992 MEDC application. For the Adells to now accuse the City of "misrepresenting" that the Adells' property would be donated for right-of-way purposes (Adells' Brief, pp 14-15) is simply indefensible. The Adells' claim that they were only referring to the ring road is unconvincing. The City's plans always showed both roads (hence the term road "system"), and the ring road improvements barely clipped a small corner of the Adell property. (See Appellant's Appendix, p 132a.) No fair reading of the Adells' letter can support such an obviously after-the-fact qualification.

The 1995 Letter from City Manager Kriewal. In 1995, the parties were still talking about a donation of the land by the Adells. Attached to the Adells' own trial brief is a draft letter dated February 24, 1995, in which the Expo Center—again the main Adell tenant, holding a lease potentially until the year 2042—promises that donation. The letter, although unsigned, is on Expo Center letterhead and says in no uncertain terms that the Adells would be donating property not just for the ring road, but also for the "collector road to the Novi Industries/Progressive Tool [PICO] facility." (Appellant's Supplemental Appendix, p 320a.)

We know now that the donation never happened, but the draft letter does supply the fair context for Mr. Kriewal's letter to Wisne dated July 7, 1995. He was still under the assumption (like the Adells' tenant) that the City already had the Adells' agreement to the spur road. The purpose of Mr. Kriewal's letter was therefore to convince Wisne into contributing more financing; it had

nothing to do with the Adells or the nature of the road improvement, which had been described as public from the first study in 1984.[3]

2. The 2004 Aerial Photograph Refutes the Pretext Claim

The Adells' use of the 2004 aerial photograph suggests that they perhaps did not appreciate the evidence that they adduced at the trial court level regarding the Grand River driveway and the benefit to the general public of its removal. They claimed then, and still claim now, that the public safety argument was "pretextual," because it was possible to relocate the driveway on Wisne's own property. They claimed, and still claim, that their stipulation that the driveway was dangerous was actually immaterial, because it would eventually be "gone" by virtue of the County's road improvement project on Grand River. Judging by their Brief in this Court, they apparently now believe that a "new" driveway was installed. It was not. The current driveway to Wisne is in the exact ***same*** location. This fact is shown by reference to various documents from the City's files, including an aerial photograph from 2000 (before the improvements) and a copy of the actual construction plans prepared for the project, which show replacement of the drive at its previously-existing—and still presumably dangerous—location. (Appellant's Supplemental Appendix, pp 322a-323a.)

That the closure of the Grand River driveway could only occur if the ring road were actually built so as to provide alternative ***public road*** access to the Wisne property has now been established, by the Adells, as an unassailable fact. The long, private, back-door easement of uncertain terms over the Expo Center area of the property that the Court of Appeals thought might be a good enough alternative road access did not convince the Road Commission, proving the City's point that the

[3] Not until 1998, three years after Mr. Kriewal's letter, did it become apparent that the Adells might not donate the property for the whole project. A letter from Mr. Juliet Rowley of JCK & Associates, the City's engineering firm, dated March 18, 1998, pretty clearly indicates that the City viewed the statement by the Adells that they did not approve of the industrial spur as a significant surprise and a change in position. (Appellant's Supplemental Appendix, p 321a.)

Road Commission would never close a public road access—even a dangerous one—if to do so meant that there would be no public road access at all.

3. The Adells Propose A New "Heightened Scrutiny" Balancing Test

The publicly-owned, publicly-maintained road at issue here would seem by definition to satisfy the "actual use" test for evaluating public use challenges. The Adells argue that even with a public road like this one, a court must still make an initial inquiry whether there is some private benefit to the project; if so, it must then weigh that benefit against any public benefit identified by the municipality, and then reach a ***legal*** conclusion whether the road is public or private. They describe this legal determination as involving a "case by case" review. (Adells' Brief, p. 26.) They are not clear as to how (or whether) a court might then go on to address the factual issue of public necessity, and they do not point to a single case in which a court of this state has actually found, on the basis of such an analysis, a public infrastructure improvement like a road to be a private use.

Ironically, what the Adells suggest as the new test to be applied in every case is actually the same test that was labeled a "heightened scrutiny" test in Poletown. The Adells claim to find the legal basis for this test in what they call "pre-Poletown" cases. But every single case that they cite on this issue involves, like Poletown, either a transfer of property to a third party or the exclusion or limitation of the public from the use of the property affected. Berrien Springs Water-Power Co. v. Berrien Circuit Judge, 133 Mich. 48; 94 N.W.2d. 379 (1903), involved a water power company with the right to use condemned land for private, for-profit uses. City of Lansing v. Edward Rose Realty, Inc., 442 Mich. 622; 502 N.W.2d. 638 (1993), involved a private, for-profit cable company being given the right to exclude others from an easement area. Shizas v. City of Detroit, 333 Mich. 44; 52 N.W.2d. 589 (1952), by far the biggest star in the Adells' legal constellation, involved the invalidation of a statute that allowed condemnation of property with the express intent to lease it to third parties for private, for-profit commercial uses from which the public could be excluded.

The Adells' reliance on State Highway Commission v. Batts, 144 S.E.2d. (NC 1965), a foreign authority, is also misplaced, in light of the same court's decision just two years later, in State Highway Commission v. Thornton, 156 S.E.2d. 248, 261 (NC 1967), on facts somewhat similar to those in this case. The North Carolina Supreme Court stated in Thornton that a dead-end road leading to a private industrial development was a public use:

> It is enough to say that habitual use, day after day, by 700 people to go to and from their place of employment, by an undisclosed number of shippers and consignees to take their freight to and receive it from the terminal of a major common carrier, by the suppliers of services and commodities to the operator of that terminal and by the trucks of that carrier in the transportation of freight is a use by the public of the road.

The Wisne complex, which at the time of the hearing below housed hundreds of employees (see Appellee's Appendix, pp. 2b-3b), comprises several hundred thousand square feet of industrial buildings (see the Adells' 2004 aerial photo), making it not much smaller than Twelve Oaks Mall.

The Adells' citation to Cleveland v. City of Detroit, 322 Mich. 172; 33 N.W.2d. 747 (1948), is also surprising, since in that case this Court pronounced, matter-of-factly and as a judicial determination without an exhaustive factual review, that "use of property for terminals for defendant's street railway system is a public use," and that the "question of the necessity of acquiring certain property for that public use" is a separate, fact-based inquiry. Id. at 179. That, of course, is the City's position in this case. The citation to Cleveland also undercuts the Adells' deep reliance on every representation or comment by just about every City employee or consultant except the only relevant entity here, the Novi City Council. Their resolution and declaration of taking unequivocally states that the spur road will be public, and that it is necessary for the public benefit. (Appellant's Appendix, pp 160a-175a.) As in Cleveland, that Council action constitutes the City's "only official action in relation to the acquisition and future use of the property." Id. at 180.

Thousands of cars travel Grand River Avenue in this area every day. That road would be safer without the Wisne driveway access, which the Adells themselves have now so dramatically (if accidentally) confirmed will never be removed without an alternative public road access being made available—which is precisely what the ring road would have provided. The Adells' position is that every public road project—and every other kind of public infrastructure improvement, from sewers to storm drains—ought to be subject to "exhaustive" review by the trial courts of this state just to determine whether the improvement is even ***public***, even before getting to the factual public necessity test of fraud/abuse of discretion. The impact of conducting such a review of every taking on judicial and taxpayer resources is mind-boggling.

The Adells dismiss the City's concerns about the fact that private parties invariably benefit from traditional public infrastructure improvements, sometimes so obviously that they are asked to pay the full cost of those improvements. They tell the Court not to worry, that there is a "public policy" in favor of clean water and soils that "generally" allows for sewer and water connections. (Adells' Brief, p 48.) That implies that there is no similar public policy in favor of safe roads. And how exactly might a court go about finding a public road—or any other traditional public use (sewer, water line, storm drain)—actually to be ***private***? Must at least three individuals or properties benefit? Or is it ten? Or fifty? The Adells point out that the courts have already indicated that they will not disturb the findings of a local government with regard to public sewer improvements. This Court said the same thing with regard to road improvements in Johnson v. Fred L. Kircher Co., 327 Mich. 377; 42 N.W.2d. 117 (1950).

Hathcock made clear that governmental agencies should not be in the economic development business. Providing adequate public infrastructure, however, is the very purpose, and therefore the business, of government. This Court is well aware that many areas of the state are burdened with aging infrastructure that will need to be addressed in some fashion. Maintenance, repair, and

reconstruction of existing improvements are activities that regularly require the acquisition of additional land, sometimes by condemnation, as do new public improvements to move traffic more safely and to serve new areas with public utilities. The Adells would require greater proofs for a local government to build a road or sewer than this Court did in Hathcock for transfers of property to third parties under the "instrumentality of commerce" test. Under that test, only one of the three exceptions must be met—without the "balancing" act the Adells propose. This taking would qualify under all three, but most clearly the second "public accountability" element.

CONCLUSION

The plain meaning of article 10, §2, unanimous and long-standing precedent, reasonable deference to ground-level legislative determinations, sound legal and public policy—all of these things demand the conclusion that a public road is an actual public use. The City does not suggest, as the Adells claim, that public roads or other infrastructure improvements are not subject to judicial review, but rather that public roads and other infrastructure have already been judicially-determined to be actual public uses. The spur road here was an actual public road that the Novi City Council determined, after study, should be part of a larger project linking two major thoroughfares that carry thousands of cars a day. The decision to close that access and replace it with a different and safer public road access was an exercise of eminent domain for a clear public use, and should also have survived judicial review on the issue of public necessity, absent a finding that the City committed fraud or true abuse of discretion in reaching it. Neither lower court found any such thing.

Respectfully submitted,

SECREST WARDLE

BY: _____

THOMAS R. SCHULTZ (P 42111)
Attorney for Appellant City of Novi
30903 Northwestern Highway
Farmington Hills, MI 48333-3040
(248) 851-9500

Dated: March 16, 2005

STATE OF MICHIGAN
IN THE SUPREME COURT

****

Appeal from the Court of Appeals
The Honorable William C. Whitbeck, the Honorable Peter D. O'Connell
and the Honorable Patrick M. Meter

****

CITY OF NOVI, a Michigan municipal corporation,

Plaintiff-Appellant,

-vs-

ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST, MARVIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., a Michigan corporation,

Defendants-Appellee.

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

/

GERALD A. FISHER (P13462)
THOMAS R. SCHULTZ (P42111)
Attorneys for Plaintiff-Appellant
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

DAVID M. FRIED (P13710)
LOUIS D. BUGBEE (P32603)
DENNIS WATSON (P31300)
Former Attorneys for Plaintiff-Appellant
41800 W. 11 Mile Road, Suite 115
Novi, MI 48375-1818
(248) 380-2000

H. ADAM COHEN (P47202)
Attorney for Defendants ADELL
28400 Northwestern Highway, Suite 120
Southfield, MI 48034-8346
(248) 356-5888

GEORGE A. PECK (P32169)
MICHAEL F. WAIS (P45482)
Co-Counsel for Defendants ADELL
300 Talon Centre
Detroit, MI 48207
(313) 396-4200

JOHN C. BOWEN (P42778)
Attorney for Defendants EXPO CENTER
43700 Expo Center Drive
Novi, MI 48375
(248) 348-5600

/